No.

FILED
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MICHAEL ROBAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

In the Matter of the January, 1972, Grand Jury,
SAMUEL M. BRIN,

Petitioner,

vs. 73-1243

UNITED STATES OF AMERICA and BERNARD C. CAREY,
States Attorney of Cook County, Illinois,

Respondents,

In the Matter of the December, 1971, Grand Jury,
RALPH SERPICO,

Petitioner,

vs.

UNITED STATES OF AMERICA and BERNARD C. CAREY,
States Attorney of Cook County, Illinois,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

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In the Matter of the January, 1972, Grand Jury,
SAMUEL M. BRIN,
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UNITED STATES OF AMERICA and BERNARD C. CAREY,
States Attorney of Cook County, Illinois,
Respondents,

In the Matter of the December, 1971, Grand Jury,
RALPH SERPICO,
Petitioner,

vs.

UNITED STATES OF AMERICA and BERNARD C. CAREY,
States Attorney of Cook County, Illinois,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Samuel M. Brin and Ralph Serpico, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District

Court for the Northern District of Illinois, Eastern Division, allowing dissemination of minutes of two federal grand juries to the State's Attorney of Cook County for the purposes of civil discovery.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this petition (Appendix "A"). The opinion of the Court of Appeals was entered December 10, 1973. A timely Petition for Rehearing was denied by order entered January 14, 1974 (Appendix "B").

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1973 (Appendix "A"). A timely Petition for Rehearing was denied on January 14, 1974 (Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 6(e)

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the

court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

QUESTIONS PRESENTED

1. Did the lower courts err in ordering the dissemination of Federal Grand Jury transcripts to the State's Attorney of Cook County on the mere request that the transcripts would aid the State's Attorney in civil discovery preparatory to the prosecution of a civil action in the state courts without any showing of particularized need?

2. Is this Court's requirement of a showing of "particularized need" as set forth in *United States* v. *Procter & Gamble,* 356 U.S. 677 still the test the movant must meet before the secrecy of a federal grand jury may be breached?

STATEMENT OF THE CASE

On May 17, 1973 the State's Attorney of Cook County through one of his assistants, without notice to either petitioner here, appeared before the Chief Judge of the District Court for the Northern District of Illinois and presented two unverified and unsupported motions to produce grand jury minutes pursuant to Rule 6(e) for purposes of civil discovery in the prosecution of civil actions the

State's Attorney had instigated against the petitioners in the state courts. The Chief Judge indicated he would grant the motions and directed the State's Attorney to return at the afternoon call with draft orders (R. 1 and 2, Tr. 5/17/73, 10:00 A.M., pp. 1-5).

By chance, the attorney for one of the petitioners was in attendance in the Chief Judge's courtroom on another matter and learned of the motions. At the proceedings at 2:00 p.m. the same day, when the State's Attorney was to present his draft orders, counsel for petitioner Brin appeared, opposed the orders, and requested time to brief the matter (Tr. 5/17/73, 2:00 p.m. pp. 1-5). The Court granted the parties each five days to brief the case and set the matter for disposition at 10:00 a.m., June 1, 1973.

Petitioners Brin and Serpico through their counsel filed briefs (R. 6 and 7) and the State's Attorney of Cook County filed a Reply Brief (R. 8).

On June 1, 1973, the Chief Judge entered his "Memorandum Of Decision On Motion To Produce Grand Jury Minutes" (R. 12, 15) and entered orders granting the motions to produce grand jury minutes relating to both petitioners (R. 11, 12, 13, 14, 15, 16, Tr. 5/1/73, pp. 1-4).

The Court further denied petitioners' request for a stay of the orders of production (Tr. 5/1/73, pp. 3-4).

Petitioners then filed their timely notices of appeal (R. 17, 19).

The Court of Appeals in an order dated December 10, 1973, affirmed the judgment of the District Court. A timely petition for rehearing was denied on January 14, 1974, and this petition follows.

REASONS FOR GRANTING THE WRIT

In this case the District Court and the Court of Appeals have allowed the dissemination of Federal Grand Jury transcripts to a State official upon his mere request without requiring any showing of particularized need, as this Court would require in *United States* v. *Procter & Gamble,* 356 U.S. 677 and cases thereafter. This Court should grant certiorari in this case since the Court of Appeals' decision has decided a federal question in a way in conflict with applicable decisions of this Court.

ARGUMENT

THE LOWER COURTS ERRED IN ORDERING PRODUCTION OF FEDERAL GRAND JURY TRANSCRIPTS TO THE STATE'S ATTORNEY OF COOK COUNTY FOR THE PURPOSE OF CIVIL DISCOVERY IN THE PROSECUTION OF A STATE CIVIL LAW SUIT WITHOUT REQUIRING A SHOWING OF PARTICULARIZED NEED.

In the case at bar, the State's Attorney of Cook County filed motions seeking the disclosure of grand jury transcripts of testimony relating to the petitioners for the purpose of civil discovery or impeachment in the prosecution of state civil law suits.

Both petitioners had been the subject of indictments and prosecution in the United States District Court charging the use of interstate facilities "with the intent to promote, manage, establish, carry on and facilitate the promotion

and carrying on of an unlawful activity, namely bribery, in violation of the laws of the State of Illinois . . .".

The State's Attorney of Cook County has filed civil actions against each of the petitioners in the Circuit Court of Cook County alleging that appellants received bribes in the course of their "official duties as deputy assessors" and seeking an accounting and monetary damages.

The sole reason set forth by the State's Attorney for requesting the grand jury transcripts relating to each petitioner (as an aside—the orders themselves are extremely overbroad and purport to order the release of "all minutes of the January, 1972 Grand Jury, relevant to allegations of violations of 18 USC 1952" and "all minutes of the December, 1971 Grand Jury, relevant to allegations of violations of 18 USC 1952" without limitation as to which investigation or witnesses are concerned. R. 12, 15) was that the State's Attorney desired said transcripts for civil discovery and impeachment in connection with the prosecution of civil law suits.

The State's Attorney's motions were not verified, nor were they supported by affidavit or even memoranda (R. 1, 2). Further the motions were presented without notice to the petitioners, the witnesses whose testimony was involved, or to the grand jurors. The only showing made is that the transcripts would be used for discovery or impeachment in connection with civil cases filed by the State's Attorney in the Circuit Court of Cook County, Illinois.

Rule 6(e) of the Federal Rules of Criminal Procedure states as follows:

> "(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror

> may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . . ."

Of the three situations provided in the rule for disclosure of grand jury testimony, two are clearly not applicable.

The only possibly applicable part of the Rule is the section providing for release by Court order "preliminarily to or in connection with a judicial proceeding."

At least one court has held that this phrase in Rule 6(e) is limited to judicial proceedings in a federal district court, and thus release of grand jury proceedings in connection with a state civil proceedings would necessarily be prohibited (*United States* v. *Crolich,* U.S.D.C.S.D. Ala. S.D., 1952, 101 F.Supp. 782 at 784).

Other courts have held that it is within judicial discretion to release the grand jury testimony, but have placed a great burden upon the movant. The cases uniformly require the movant to demonstrate "particularized need" or "compelling necessity" substantiated by facts.

In *United States* v. *Procter & Gamble,* 356 U.S. 677 (1958), the defendants sought grand jury transcripts for purposes of discovery. The Supreme Court stated that the "indispensable secrecy" of the grand jury should not be broken except where there is compelling necessity and

that such need must be shown with particularity. The Court held that discovery purposes do not fulfill the necessary particularized need showing. The burden is on the movant to show that a particularized need exists for the grand jury transcripts which outweighs the policy of secrecy that is "older than our Nation itself." *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959).

Judge Poos wrote in *United States* v. *Downey,* D.C. S.D. Ill. S.D. 1961, 195 F.Supp. 581 at 588:

> "movants are not entitled as a matter of court discretionary right to have the transcript until an adequate showing is made with factual reasons to justify disclosure."

Also see: *Petition of Brooke,* D.C.D. Mass. 1964, 229 F.Supp. 377; *In Re Grand Jury Investigation (General Motors Corporation)* 32 F.R.D. 175, appeal dismissed 318 F.2d 533, certiorari denied 375 U.S. 802, 11 L.Ed.2d 37; *United States* v. *Battaglia,* 7 Cir. 394 F.2d 304; *Application of State of California,* E.D. Pa. 1961, 195 F.Supp. 37; *United States* v. *American Oil Company,* E.D. Mo., 1966, 264 F.Supp. 93; and *ABC Great Stores Inc.* v. *Globe Ticket Co.,* D.C. E.D. Penn., 1970, 309 F.Supp. 181 at Page 183:

> ". . . the law requires that before the veil of grand jury secrecy may be lifted, the party seeking disclosure must demonstrate a more compelling and particularized need than merely expediting civil discovery."

The Court is again reminded that the only purpose for which the State's Attorney requested the grand jury transcripts is for discovery and impeachment in connection with civil cases he has filed in the Circuit Court of Cook County and this by way of an unverified petition unsupported by affidavit.

The Seventh Circuit Court of Appeals in *In Re Holovacha*, 7 Cir. 1963, 317 F.2d 834, after making particular comment that the petition was unverified and that there was no affidavit, held the release of grand jury minutes to a State Attorney General to be in abuse of discretion and said at page 836:

> "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow."

* * *

and at page 837:

> "The application of secrecy to its proceedings is a safeguard for the grand jury itself, because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings."

and at page 837:

> "The convenience of discovery by access to grand jury minutes has *never* been regarded as sufficient cause to lift the secrecy of grand jury proceedings." (Emphasis added)

That Court also stated in *In Re April 1956 Grand Jury*, 7 Cir. 1956, 239 F.2d 263 at pages 271 and 272:

> "In this country, as in England of old, the grand jury acts in secret. Costello v. United States, supra, 350 U.S. at page 362, 76 S.Ct. 406. Grand jury proceedings are traditionally secret. United States v. Rose, 3 Cir. 215 F.2d 617, 628. From earliest times, it has been the policy of law to shield the proceedings of grand juries from public scrutiny.
>
> * * *
>
> ". . . we hold that the safeguard of secrecy in the interest of the public, continues even after the grand jury has completed its efforts and therefore forbids any use in civil proceedings of information derived by or through an examination of records and documents made under the authority of the grand jury."

It might be noted that the lower Court's orders herein, in effect, release the grand jury testimony to public dominion, the only restriction being that the transcripts are not to be placed in evidence in the civil cases filed by the State's Attorney.

Clearly, the District Court abused its discretion, in fact it would be fair to say that the District Court did not exercise discretion since there was no evidence or facts presented to it and the Court of Appeals decision affirming that action was erroneous.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that their Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued November 26, 1973
December 10, 1973.

Before

Hon. TOM C. CLARK, Associate Justice*
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. JAMES E. NOLAND, District Judge**

In the Matter of the January, 1972 Grand Jury
SAMUEL M. BRIN, *Appellant,*
Nos. 73-1550 and 73-1551 vs.
UNITED STATES OF AMERICA,
BERNARD C. CAREY, State's Attorney of Cook County,
Movant-Appellees.

In the Matter of the December, 1971 Grand Jury
RALPH SERPICO,
vs. *Appellant,*
UNITED STATES OF AMERICA,
BERNARD C. CAREY, State's Attorney of Cook County,
Movant-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-GJ-205 No. 72-GJ-1291

EDWIN A. ROBSON, *Judge.*

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*Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

**District Judge James E. Noland of the Southern District of Indiana is sitting by designation.

ORDER

The district judge, after a full hearing, directed the United States Attorney to disclose to the State's Attorney of Cook County, Illinois, the minutes of the federal grand juries sitting in his district during December, 1971 and January, 1972, with respect to the portions thereof relating to the indictment of Samuel M. Brin and Ralph Serpico, both of whom participated through counsel at said hearing. We affirm on the unreported opinion of the district judge.

The record shows that the State's Attorney had filed separate civil suits in the Circuit Court of Cook County against Brin and Serpico, seeking in each case to recover for the use of Cook County bribes that each of said parties had received while acting as Deputy Assessors of the County. The record shows further that the December, 1971, federal grand jury had indicted Serpico for the receipt of bribes while acting as Deputy Assessor and he had plead guilty to receiving a $9,000 bribe; likewise the January, 1972 federal grand jury had indicted Brin for receipt of bribes while acting as Deputy Assessor and he had plead guilty to receiving a $50 bribe. The State's Attorney claimed that "for the proper prosecution" of such civil suits "it is essential for the plaintiff to have disclosed to them the matters occurring before" such grand juries.

The district judge found that the State's Attorney had shown "a particularized need for the minutes in that there is no alternative source from which it can obtain the information." Counsel for Brin and Serpico assert that the State's Attorney should be required to seek information for his proceedings from Brin and Serpico, both of whom are now in prison. But this would be an unfruitful source and counsel could point to no other avail-

able one. Moreover, we agree with the United States Attorney that the public interest in the secrecy of grand juries would not be compromised here. Both of the grand juries have long since been discharged, the indictments as to Brin and Serpico have been disposed of and the disclosure of the minutes was not shown to have had any untoward effect.

The authorization here comes within the provision of Rule 6(e) of the Federal Rules of Criminal Procedure wherein such minutes may be released within the sound discretion of the trial judge "in connection with a judicial proceeding." The County's suits for the recovery of the illegal fruits of criminal conduct of its employees would certainly be "essential to the attainment of justice and the vindication of truth." *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir. 1956).

Brin and Serpico insist that Rule 6(e) applies only to disclosure with regard to federal judicial proceedings but we find no such restriction in the rule. Certainly the state and federal governments should cooperate fully where the dishonesty and infidelity of public employees is involved, otherwise a free society could not exist.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 14, 1974

Before
Hon. TOM C. CLARK, Associate Justice
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. JAMES E. NOLAND, District Judge

IN RE: SPECIAL DECEMBER 1971 GRAND JURY SAMUEL BRIN, WITNESS,

Appellant,

No. 73-1550 vs.

UNITED STATES OF AMERICA,

Appellee.

* * *

RALPH SERPICO, WITNESS,

Appellant,

No. 73-1551 vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(71 GJ 205)
(72 GJ 1291)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.